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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA
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9 United States of America,
10 Plaintiff

11 vs.

12 Frank Goldstein,
13 Defendant
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Case No.: 2:10-cr-00525-JAD-PAL

**Order Approving Report of
Findings and Recommendation
[Doc. 137] and Denying Defendant's
Motion to Suppress [Doc. 122]**

15 Defendant Goldstein is accused of carjacking a 1999 GMC Yukon and using the stolen
16 vehicle in attempted pharmacy robbery. The parties agree that Goldstein—driving the car he is
17 accused of carjacking—led the police on an approximately fifteen minute chase before colliding with
18 an unoccupied car and a traffic light, becoming disabled. *See* Doc. 122 at 1–2; Doc. 127 at 2–3.
19 After Goldstein was taken into custody and removed from the scene, the vehicle and its
20 contents—including “a blue and black ‘Hilton Grand Vacations Club’ bag” belonging to
21 Goldstein—were searched, revealing, *inter alia*, a black weapons magazine with seven cartridges.
22 Doc. 122 at 2–3; Doc. 127 at 3. By his motion to suppress, Goldstein challenges the search of the
23 vehicle and his bag, contending that it fails to satisfy the search-incident-to-arrest automobile
24 exception or the inventory-search exception and, thus, the fruits of the search should be suppressed.
25 Doc. 122 at 5. The Magistrate Judge did not reach the question of whether the search satisfied a
26 recognized exception to the warrant requirement because she found that Goldstein failed to clear a

1 more elementary hurdle in his challenge—demonstrating that he has standing to object to the search
 2 of the stolen car and its contents—and she recommended denial of the motion to suppress. Doc. 137
 3 at 5–6. By his objection, Goldstein does not dispute the Magistrate Judge’s conclusion that he lacks
 4 standing to challenge the search of the car generally; rather, he contends that he still had a reasonable
 5 expectation of privacy in the closed bag and that the search of its contents without a warrant was
 6 unlawful. Doc. 148.

7 The court has conducted a de novo review of the record in this case in accordance with 28
 8 U.S.C. § 636(b)(1), Federal Rule of Criminal Procedure 59(b)(3), and Local Rule 3-2, determines
 9 that the Magistrate Judge’s recommendation will be accepted, Doc. 137, and denies Defendant
 10 Goldstein’s Motion to Suppress, Doc. 122, for the reasons set forth in the Report and
 11 Recommendation and those additional reasons set forth herein.

12 I.

13 Discussion

14 A. Defendant Did Not Demonstrate Standing to Challenge the Search of the Vehicle or its 15 Contents.

16 “The Fourth Amendment protects people rather than places, but ‘the extent to which the
 17 Fourth Amendment protects people may depend upon where those people are.’” *United States v.*
 18 *Nerber*, 222 F.3d 597, 599 (9th Cir. 2000) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).
 19 “A criminal defendant may invoke the protections of the Fourth Amendment—including the
 20 exclusionary rule—‘only if he can show that he had a legitimate expectation of privacy in the place
 21 searched or the item seized.’” *United States v. Borowy*, 577 F. Supp. 2d 1133, 1136 (D. Nev. 2008)
 22 *aff’d*, 595 F.3d 1045 (9th Cir. 2010) (quoting *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir.
 23 2007)). To establish a legitimate expectation of privacy, a criminal defendant “must demonstrate a
 24 subjective expectation that his activities would be private, and he must show that his expectation was
 25 ‘one that society is prepared to recognize as reasonable.’” *Nerber*, 222 F.3d at 599 (quoting *Bond v.*
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1 *United States*, 120 S. Ct. 1462, 1465 (2000)).

2 “[T]o say that a party lacks [F]ourth [A]mendment standing is to say that *his* reasonable
3 expectation of privacy has not been infringed. It is with this understanding that we use ‘standing’ as
4 a shorthand term.” *United States v. Pulliam*, 405 F.3d 782, 785–86 (9th Cir. 2005) (quoting *United*
5 *States v. Taketa*, 923 F.2d 665, 669–70 (9th Cir.1991)) (citation omitted) (emphasis in original). “A
6 person who is aggrieved by an illegal search and seizure only through . . . damaging evidence
7 secured by a search of a third person’s premises or property has not had any of his Fourth
8 Amendment rights infringed.” *Pulliam*, 405 F.3d at 785–86 (quoting *Rakas v. Illinois*, 439 U.S. 128,
9 134 (1978)). If a defendant lacks standing to challenge a search of a vehicle, the inquiry ends there
10 and the exclusionary rule does not apply. *See U.S. v. Thomas*, 447 F.3d 1191, 1199 n.9 (9th Cir.
11 2006).

12 The law generally recognizes that a person has no legitimate expectation of privacy in stolen
13 property or premises. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978) (upholding a search
14 where defendants “asserted neither a property nor a possessory interest in the automobile, nor an
15 interest in the property seized”); *cf. Fisher v. United States*, 425 U.S. 391, 407 (1976) (writing that
16 “fruits and instrumentalities of crime[] may now be searched for and seized under proper
17 circumstances”). As the Ninth Circuit explained in *United States v. Caymen*, “[t]he Fourth
18 Amendment does not protect a defendant from a warrantless search of property that he stole, because
19 regardless of whether he expects to maintain privacy in the contents of the stolen property, such an
20 expectation is not one that ‘society is prepared to accept as reasonable.’” 404 F.3d 1196, 1200 (9th
21 Cir. 2005) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)) (internal quotation marks
22 omitted).

23 A person driving a stolen vehicle lacks any privacy expectation in the vehicle. The Ninth
24 Circuit reasoned in *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994), when affirming the denial of a
25 motion to suppress, that “petitioner lacked standing to challenge the search. The van was stolen and
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1 petitioner knew it was stolen. Only the vehicle's owner or an individual with a legitimate privacy
2 interest in the vehicle may challenge the search."

3 The lack of privacy interest in the vehicle extends to its contents, for if a defendant driver
4 lacks a possessory interest in a car, he lacks standing to object to a search of the vehicle and its
5 contents. Thus, in *United States v. Thomas*, 447 F.3d at 1198, the Ninth Circuit upheld the district
6 court's denial of the defendant's motion to suppress evidence including "nearly 600 grams of
7 cocaine in what police described as 'a Sprint bag, a small . . . telephone bag,' located next to the
8 spare tire in the vehicle's trunk." *Id.* at 1195 (citations omitted). Because the defendant failed to
9 establish that he had permission to drive the rental vehicle in which it was found, he "lacked
10 standing to challenge the search." *Id.* at 1199.

11 The court also finds persuasive the reasoning of the Fourth Circuit Court of Appeals in
12 *United States v. Hargrove*, 647 F.2d 411 (4th Cir. 1981), and *United States v. Wellons*, 32 F.3d 115
13 117 (4th Cir. 1994). In *Hargrove*, the Fourth Circuit considered and rejected the very notion
14 advocated by Goldstein here, that the occupant of a stolen vehicle has an expectation of privacy in
15 the personal effects he brings into a stolen vehicle. The *Hargrove* court explained:

16 One who can assert no legitimate claim to the car he was driving cannot reasonably
17 assert an expectation of privacy in a bag found in that automobile. Whether a person
18 has an expectation of privacy in a container that is searched is not determined by his
19 subjective beliefs. His expectation must be objectively reasonable. **A person who
cannot assert a legitimate claim to a vehicle cannot reasonably expect that the
vehicle is a private repository for his personal effects, whether or not they are
enclosed in some sort of a container,** such as a paper bag.

20 *Id.* at 412 (citing *Rakas*, 439 U.S. at 151–52 (Powell, J., concurring); *United States v. Smith*, 621
21 F.2d 483, 486–88 (2d Cir. 1980)) (emphasis added). The Fourth Circuit applied *Hargrove* in
22 *Wellons* to reject the defendant's argument that, "even if he had no reasonable expectation of
23 privacy" in a rental car he was not authorized to drive, "he retained a reasonable expectation of
24 privacy in his luggage which he placed in the car." *Wellons*, 32 F.3d at 119. *See also United States*
25 *v. White*, 504 Fed. Appx. 168, at *171 (3d Cir. Nov. 15, 2012) (writing that defendant had no
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1 legitimate privacy expectation in stolen minivan or its contents, including a closed backpack and
 2 locked document box found inside the vehicle that contained evidence relating to theft).

3 Defendant Goldstein has made no effort to demonstrate that his use of the Yukon, which he is
 4 accused of carjacking, was anything but unauthorized. As he lacked any possessory right to that
 5 vehicle, he cannot “reasonably expect that the vehicle is a private repository for his personal effects,
 6 whether or not they are enclosed in some sort of a container.” *Hargrove*, 647 F.2d at 412. Thus,
 7 Goldstein did not have a legitimate expectation of privacy in any of the personal effects he left in the
 8 vehicle, and he lacks standing to object to their search and seizure.

9 Defendant’s reliance on *United States v. Davis*, 332 F.3d 1163, 1166 (9th Cir. 2003), for the
 10 notion that the owner of a closed container may have a right to privacy in that container even when
 11 he lacks a possessory right to the area in which it is stored, *see* Doc. 131 at 2-3; Doc. 148 at 6, is
 12 misplaced. *Davis* stands for the proposition that the Fourth Amendment protects a defendant’s
 13 “expectation of privacy in the contents of his bag, stored under the bed in an apartment where he
 14 sleeps and keeps his belongings.” *United States v. Davis*, 332 F.3d 1163, 1168 (9th Cir. 2003). Key
 15 to *Davis* was the presence of this closed container inside the defendant’s occasional dwelling place.
 16 *Davis*, 332 F.3d at 1167 (“Davis was more than simply an occasional houseguest . . .”). It is
 17 well-established that even overnight guests have an expectation of privacy in the home where they
 18 are staying. *Id.* (citing *Minnesota v. Olson*, 495 U.S. 91, 96–97 (9th Cir. 2000)). *Rakas* rejected the
 19 idea that homes and automobiles enjoy the same level of Fourth Amendment protection, explaining,

20 It is unnecessary for us to decide here whether the same expectations
 21 of privacy are warranted in a car as would be justified in a dwelling
 22 place in analogous circumstances. We have on numerous occasions
 pointed out that cars are not to be treated identically with houses or
 apartments for Fourth Amendment purposes.

23 *Rakas*, 439 U.S. at 148 (collecting authorities). Thus, *Davis* is inapposite.

24 The United States Supreme Court’s recent opinion in *United States v. Jones*, 132 S. Ct. 945
 25 (2012), also has no application here. Goldstein represents that *Jones* “specifically stated when the
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1 Government intruded upon a person's property to place a tracking device on a vehicle, that
2 constitutes an intrusion on privacy within the meaning of the Fourth Amendment." Doc. 148 at 5–6.
3 *Jones* involved the attachment of a GPS device to a vehicle that the FBI and metropolitan police
4 suspected was being used in trafficking narcotics. *Jones*, 132 S. Ct. at 947. The crux of the decision
5 was the Supreme Court's conclusion that, by attaching the device, "[t]he Government physically
6 occupied private property for the purpose of obtaining information"—and that this physical
7 occupation constituted a search. *Id.* at 949. The issue in the instant case is not whether the
8 government conducted a search, but whether Goldstein had standing to object to it. And the
9 Magistrate Judge correctly concluded that Goldstein did not. As Defendant lacks standing to
10 challenge the warrantless search of the vehicle and its contents, his motion to suppress, Doc. 122,
11 must be denied.

12 **B. The Search is a Valid Automobile Search Incident to Arrest.**

13 Even if Goldstein had a reasonable expectation of privacy in the vehicle or the bag and could,
14 therefore, assert a Fourth Amendment challenge, his motion to suppress should still be denied
15 because the warrantless search was a permissible automobile search incident to arrest. Goldstein
16 contends that the search is not protected by this exception because he "had been removed from the
17 vehicle, handcuffed, placed into an ambulance and driven to the hospital" before the arrest occurred,
18 and because the car was immobilized. Doc. 148 at 6–7. This argument fails because it ignores the
19 second half of the automobile exception.

20 As the United States Supreme Court explained in *Arizona v. Gant*, 129 S. Ct. 1710, 1713
21 (2009)—although *New York v. Belton*, 453 U.S. 454 (1981), "does not authorize a vehicle search
22 incident to an occupant's arrest after the arrestee has been secured and cannot access the interior of
23 the vehicle"—the exception allows a later search when it is reasonable to believe that the vehicle
24 contains evidence of the offense of arrest. The high court reasoned, "circumstances unique to the
25 vehicle context [also] justify a search incident to arrest when it is 'reasonable to believe evidence
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1 relevant to the crime of arrest might be found in the vehicle.” *Gant*, 129 S. Ct. at 1719 (quoting
2 *Thornton v. United States*, 541 U.S. 615, 632 (2004)). In *Davis v. United States*, the Court
3 acknowledged that *Gant* established “a new, two-part rule under which an automobile search
4 incident to a recent occupant’s arrest is constitutional (1) if the arrestee is within reaching distance of
5 the vehicle during the search, *or* (2) if the police have reason to believe that the vehicle contains
6 ‘evidence relevant to the crime of arrest.’” *Davis v. United States*, 131 S. Ct. 2419, 2425 (2011)
7 (emphasis added) (quoting *Gant*, 129 S. Ct. at 1719). Thus, the exception does not apply only when
8 the arrestee is within reaching distance of the vehicle; it authorizes a search after the arrestee is
9 removed from the arrest scene if it is “reasonable to believe evidence relevant to the crime of arrest
10 might be found in the vehicle.” *Id.* (quoting *Thornton*, 541 U.S. at 632). When that occurs, “the
11 offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle
12 **and any containers therein.**” *Id.* (emphasis added); *cf. United States v. Ross*, 456 U.S. 798 (1982)
13 (“an individual’s expectation of privacy in a vehicle and its contents may not survive if probable
14 cause is given to believe that the vehicle is transporting contraband.”); *Warden, Md. Penitentiary v.*
15 *Hayden*, 387 U.S. 294, 306 (1967) (police may “seize evidence simply for the purpose of proving
16 crime.”).

17 Although Goldstein was not in reaching distance of the vehicle at the time of the search, this
18 fact is not dispositive because the offense of his arrest “suppl[ied] a basis for searching the passenger
19 compartment” of the vehicle “and any containers therein.” *Gant*, 129 S. Ct. at 1719. Goldstein was
20 arrested after a reported robbery attempt and after leading police on a high speed chase. *See Doc.*
21 *122* at 1–2 (wherein the defense recites that “Mr. Goldstein was shot by a pharmacy employee while
22 attempting to flee without having stolen anything, with the bullet from the shot entering his back and
23 exiting his thigh. After Mr. Goldstein fled, police were called to investigate and a chase of Mr.
24 Goldstein in the car he is accused of carjacking ensued, lasting fifteen minutes.”). Under these
25 circumstances, it would be reasonable to believe that the vehicle contained evidence of the robbery
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1 attempt. Accordingly, the search of the vehicle was a permissible automobile search incident to
2 arrest as contemplated by the second half of the *Gant* rule, and Goldstein's motion to suppress
3 should be denied on this independent basis also.

4 **II.**

5 **Conclusion**

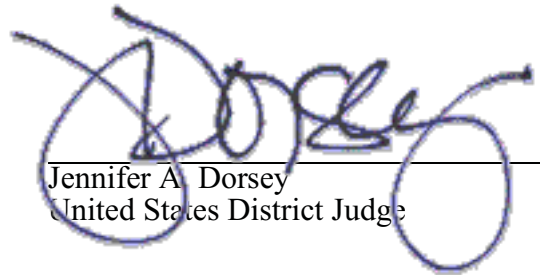
6 Accordingly, for the reasons set forth herein and for good cause shown,

7 **IT IS HEREBY ORDERED** that Magistrate Judge Leen's Report and Recommendation
8 **[Doc. 137] is ACCEPTED** to the extent that it is not inconsistent with this order; and

9 **IT IS FURTHER ORDERED** that Defendants' Motion to Suppress Physical Evidence
10 Obtained in Violation of the Fourth Amendment **[Doc. 122] is DENIED.**

11 Dated September 25, 2013.

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Jennifer A. Dorsey
United States District Judge